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UNITED TELECOM COUNCIL
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Marlene Dortch, Secretary
Federal Communications Commission
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Filed on Behalf of: ALLTEL Communications, AT&T Wireless, Cellular Telecommunications & Internet Association (CTIA), Cinergy Corporation, Cingular Wireless, City of Baltimore, Maryland, Consumers Energy Company, Duke Energy, National Rural Electric Cooperative Association (NRECA), Southern LINC, United States Cellular, United Telecom Council (UTC) and Verizon Wireless

Ex Parte Notice – WT Docket No. 02-55
Improving Public Safety Communications in the 800 MHz Band

To the Secretary:

The Commission has undertaken a rulemaking proceeding to resolve interference experienced by public safety and other private mobile licensees in the 806-824 / 851-869 MHz ("800 MHz") band. Among the many submissions in this proceeding is an elaborate and complex band realignment scheme that was proposed by Nextel and other parties (the so-called "Consensus Plan"). Comments filed with the Commission have identified numerous problems with this Plan, including that (1) it would not resolve the interference problems experienced by 800 MHz licensees, (2) it would result in substantial burdens and costs to 800 MHz users, (3) it would limit the technological evolution of systems operating in the 800 MHz band, and (4) it would result in an unlawful windfall to Nextel, the entity that is responsible for the vast majority of interference in the 800 MHz band.

In addition to the issues identified above, the above-listed parties take this opportunity to emphasize a very simple but fundamental principle that must guide the Commission as it considers the Consensus Plan. The FCC should not even consider the Plan's proposed realignment of the 800 MHz band until the Commission has been assured the myriad of questions regarding the funding mechanism and amount proposed to fund rebanding by Nextel have been answered.

The Plan proposed by Nextel provides no such assurance. The Plan itself is vague on details, but one fact is clear: there is virtually no upfront funding and no workable, enforceable mechanism to ensure that funding will ever be there.

The attached document synthesizes the many concerns of parties already filed with the Commission on this issue, and demonstrates that the commitment by Nextel Communications Inc. to fund 800 MHz relocation is an "$850 Million Mirage." Specifically, the record demonstrates:

- The $850 million promised by Nextel is not enough;
- The Plan's mechanism for determining reimbursable costs and ensuring payment is fraught with uncertainty; and
- The funding obligation assumed by Nextel is illusory – there is no assurance that the money will be available.

In fact, the only certain result that would come from adoption of the Consensus Plan is that Nextel will be granted for free 10 MHz of spectrum in the 1.9 GHz band in exchange for an initial $25 million contribution and a promise to pay the remainder of its insufficient commitment over time. Even in the unlikely event that Nextel were to eventually make good on its promise, the Plan provides no assurance to public safety and other relocating licensees when, if ever, they will be fully reimbursed. While Nextel walks away with free spectrum, incumbent 800 MHz licensees may end up holding the bag.

Realignment would involve a significant amount of disruption, forcing police, fire and rescue services; electric, gas and water utilities; oil and gas pipeline systems; railroads, other transportation companies and many other users to move many of their wireless communications systems to different spectrum and in many instances purchase new equipment. Before embarking on a realignment of the 800 MHz band, the Commission has a critical responsibility to ensure that public safety entities and other 800 MHz band incumbents will be better off for it. Ensuring adequate funding for relocation is fundamental to fulfilling this responsibility.

Respectfully submitted,

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Attachment

THE CONSENSUS PLAN'S $850 MILLION MIRAGE

I. SUMMARY

The "Consensus Plan" proposes to relocate hundreds of users in the 800 MHz spectrum band. If the FCC adopts the Plan, police, fire and rescue services, oil and gas pipeline systems, railroads, other transportation companies and many other users would be forced to move many of their wireless communications systems to different spectrum and in many instances purchase new equipment. The operations of 800 MHz licensees are critical to public safety, as well as to the nation's infrastructure of utilities and transportation networks. The FCC should not embark on a plan that requires massive spectrum relocations unless and until it has been assured that sufficient money is available in advance to fund it. While there are other flaws inherent in the Consensus Plan,[1] this paper focuses on the problems associated with its funding, including:

1. $850 million is not enough to fund the realignment of 800 MHz.

2. The mechanism for cost reimbursement is unwieldy and does not provide certainty that 800 MHz users will be reimbursed.

3. Any obligation on Nextel to fund the plan is illusory.

Acknowledging that the massive spectrum relocations prescribed by the Consensus Plan will be extremely costly, the Plan states that Nextel will "fund the required relocation of 800 MHz incumbent licensees pursuant to the Plan up to a total of $850 million, of which $700 million is dedicated for public safety licensees and $150 million is dedicated for non-public safety licensees."[2]

As detailed below, the Plan unfortunately does not come close to assuring that the huge costs of forced relocation will in fact be funded. Far from being a "donation" of $850 million from Nextel (as some parties have assumed), the Plan's very limited details raise troubling questions about how real that funding is – and whether it is anywhere close to enough. There is in fact no "consensus" on how much this massive realignment will cost. Moreover, the Plan's proposed mechanism for determining reimbursable costs and paying those costs would subject public safety and private wireless incumbents to numerous uncertainties. Because the Plan does not commit to reimburse public safety entities before they incur relocation costs, state and local governments may need to pay these costs up front, and hope to get reimbursed at some

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[1] Parties to the FCC's rulemaking have noted that, in addition to funding problems, there are other flaws with the Consensus Plan, including that (1) it would not resolve the interference problems experienced by 800 MHz licensees, (2) it would result in substantial burdens and costs to 800 MHz users, (3) it would limit the technological evolution of systems operating in the 800 MHz band, and (4) it would result in an unlawful windfall to Nextel, the entity that is responsible for the vast majority of interference in the 800 MHz band. *United Telecom Council and the Edison Electric Institute* (Feb. 10, 2003), *City of Baltimore, Maryland* (Feb. 10, 2003), *Cellular Telecommunications & Internet Association* (Feb. 10, 2003), *ALLTEL/AT&T Wireless/Cingular/Sprint/ Southern LINC/U.S. Cellular* (Feb. 10, 2003).

[2] Supplemental Comments of the Consensus Parties in WT Docket No. 02-55 at 5 (Dec. 24, 2002). In the original Consensus Plan, which was submitted on August 7, 2002, Nextel had committed to fund up to $500 million to cover relocation costs incurred by 800 MHz public safety licensees. Nextel's revised commitment is supported by an appendix that provides an estimate of the costs involved in relocating both public safety licensees ($698.6 million) and non-public safety 800 MHz licensees ($129.6 million).

indeterminate future time. Even if this were feasible in times of unprecedented state and local budget deficits, governments cannot be assured that they will be able to fully recoup their expenses. Finally, questions abound as to the Commission's ability to enforce Nextel's funding commitment.

The FCC would be doing 800 MHz users a grave disservice if it considers the Consensus Plan before these and many other funding issues are adequately addressed. The record is woefully incomplete as to both the structure and adequacy of the funding mechanism. Put another way, the current record can lead to only one conclusion – assurance of the funding is not there. For this reason, as well as the many other problems with the Plan as detailed in the record,[3] the FCC must reject the Consensus Plan.

I. DISCUSSION

THE PLAN'S FUNDING MECHANISM IS SERIOUSLY FLAWED

The Consensus Parties propose to establish a Relocation Fund "to finance incumbent retuning costs, funded by Nextel, and managed by an independent Fund Administrator acceptable to Nextel . . . ."[4] Nextel will make an initial $25 million cash contribution to the Fund, and will "assure the Commission and incumbent licensees that its funding commitment over the life of the Plan will be satisfied" by:

- Setting up one or more separate affiliates to hold assets to secure Nextel's funding obligation (described as "10 MHz of replacement spectrum in the 1.9 GHz band for which Nextel will be granted licenses"); and
- Pledging the stock of these entities to an escrow agent/trustee, who will have the power to sell the assets and hold the cash proceeds in escrow for the benefit of the Fund Administrator in the event Nextel fails to meet its payment obligations under the Consensus Plan.

Few details are provided. Even the minimal information in the plan is more than enough, however, to show that the Plan is seriously flawed. Indeed, it fails in its central goal of ensuring that sufficient funds are available in advance to pay for the massive relocation that would occur. The record contains substantial and substantive criticisms of the funding plan. Parties' objections and concerns fall into three main areas:

1. $850 Million Is Not Enough. Even if Nextel meets its funding commitment, the fund is inadequate to the task. Nextel's commitment to the relocation fund is "capped" at $850 million, and the FCC cannot conclude that this amount will be enough to pay for relocation. To the contrary, the stated basis for the Plan's $850 million figure ignores or seriously underestimates various relocation costs. The record is replete with evidence that actual relocation costs will far exceed that amount. This creates the considerable risk that the

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[3] Among the other obstacles to implementation of the Consensus Plan is the fact that legislation may be required before the 700 MHz Guard Band spectrum that Nextel proposes to relinquish can be reallocated to public safety use. Nextel's funding commitment is expressly conditioned upon receipt of a nationwide 10 MHz license in the 1.9 GHz band, which Nextel contends is justified in part by the return of its 700 MHz Guard Band licenses. It would be unwise for the FCC to order a massive relocation whose funding is conditioned on subsequent legislation.

[4] *Consensus Parties* at 7 (Dec. 24, 2002).

relocation will be stopped mid-course, because some parties will relocate but the money will run out before the process is completed. That would leave some 800 MHz band users in limbo and frustrate the very goals the FCC is seeking to achieve in this proceeding.

2. The Plan's Mechanism for Determining Reimbursable Costs and Ensuring Payment is Fraught with Uncertainty. Because the Plan is structured to allow for reimbursement of costs already incurred, it would force public safety systems and other 800 MHz users to incur a requirement to pay for relocation first, and then apply for reimbursement – without any assurance when or how much they will actually be paid.[5] Worse, users are not guaranteed reimbursement of their full expenses, only "reasonable" costs with reasonableness determined by the Nextel-chosen Fund Administrator and the Relocation Coordination Committee (which would include Nextel and have only minority public safety representation). Nor is there any requirement that the Fund Administrator pay within a set time period after a reimbursement request is made. While Nextel would walk away with new spectrum immediately, relocating 800 MHz users would have no assurance how much or when they will ever be reimbursed.

3. Any Funding Obligation Is Illusory. Parties that oppose the Plan object to the structure of the alleged "commitment" because it lacks any assurance that the money will be available. There is no binding obligation on Nextel to fund relocation, nor any mechanism for ensuring that the money will be there. Instead, the Plan relies on an as-yet non-existent Nextel affiliate to "secure" nearly all of the $850 million, by pledging that entity's stock, secured by the licenses it would hold in the 1.9 GHz spectrum. This obviously speculative venture is a far too shaky foundation on which to pursue a massive spectrum realignment. It also raises, among many other problems, the specter of another NextWave-type installment financing debacle.

This analysis compiles these and other concerns, to assist the FCC in ensuring that it carefully scrutinizes the sufficiency of the Plan's funding mechanism.

$850 MILLION IS NOT NEARLY ENOUGH

Nextel has made it very clear that the risk that relocation costs exceed the fund would be entirely borne by public safety and other 800 MHz users. Commenters have raised numerous concerns about the adequacy of the fund because it is "capped" at $850 million. Because of the significant risk that the proposed amount is insufficient, some have stated that a cap is unacceptable.[6]

1. Public Safety and Other 800 MHz Users May Be Harmed if Financing Runs Out. If reimbursement money runs out, the consequences could be disastrous. The FCC could not order payment and the proposed realignment of the 800 MHz band would not be completed. The Plan offers neither contingency plans nor proposed solutions if relocation costs exceed its estimates. Some public safety licensees would be stranded in their current spectrum assignments, resulting

[5] As discussed infra, the Fund Administrator may direct funds to vendors that incur costs at the direction of the licensee. However, this does not relieve the licensee of its contractual obligation to pay for these relocation expenses.

[6] *City of Philadelphia* at 2 (Feb. 10, 2003); *Public Safety Improvement Coalition* at 2 (Feb. 10, 2003. Indeed, one commenter pointed out that the FCC "has never adopted a capped approach to a party's obligations to finance relocation of licensees." *Small Business in Telecommunications* at 6 (Jan. 10, 2003).

in a "bifurcated" band that would exacerbate interference problems and compromise public safety interoperability.[7]

Given the consequences should the fund not be sufficient, it is critical that the FCC ensure that the capped fund is sufficient to pay for relocation. However, the record does not come close to providing the FCC that assurance.

2. Other Relocation Cost Estimates Exceed $850 Million. Before the FCC embarks on a massive – and to some extent irreversible – spectrum relocation, the burden must be on the Plan's proponents to show that the proposed funding level will be sufficient to provide complete reimbursement of 800 MHz relocation costs. Even assuming that Nextel meets its full funding commitment, such a showing has not been made. To the contrary, the record contains various estimates of relocation costs that run as high as <u>$3 billion</u>.[8]

Some commenters challenge the $850 million estimate because the number of public safety systems sampled was too small and the systems that were sampled were not representative of large-scale public safety systems.[9] Others point out that it is unclear precisely what costs were taken into consideration to arrive at the $850 million estimate.[10] Others argue that a permanent, renewable source of funding is required as a backstop because of the likelihood that $850 million will not be sufficient.[11]

3. The Plan Underestimates the Massive Cost of Replacing Radios. Even the public safety organizations that subscribe to the Plan admit that Nextel's funding commitment is based on an estimate of total costs that is subject to "several significant variables," in particular, the number of public safety radios that will need to be replaced.[12] Many commenters question the validity of the estimate because of uncertainty over this issue.[13]

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[7] *Public Safety Improvement Coalition* at 2 (Feb. 10, 2003); *Michigan Dept. of Information Technology* at 3 (Feb. 10, 2003); *City of Baltimore* at 4 (Feb. 10, 2003); *State of Florida* at para. 3 (Feb. 10, 2003); *Border Area Coalition (Boeing/Consumers Energy/DaimlerChrysler/Pinnacle West/San Diego)* at 13 (Feb. 10, 2003); *Southern LINC* at 7 (Feb. 10, 2003).

[8] *ALLTEL/Cingular/AT&T Wireless/Sprint Corp/Southern LINC/U.S. Cellular* at 7 (Feb. 25, 2003); *Preferred Communication Systems, Inc*. at 2 (Feb. 25, 2003); *City of Fort Lauderdale* at 2 (Sept. 23, 2002).

[9] *City of Philadelphia* at 2 (Feb. 10, 2003) (challenging the sufficiency of the $700 million earmarked for public safety); *Michigan Department of Information Technology* at 3 (Feb. 10, 2003).

[10] *Public Safety Improvement Coalition* at 3-5 (Feb. 10, 2003); *East Bay Municipal Utility District* at 7 (Feb. 10, 2003); *National Rural Electric Cooperative Association* at 16-17 (Feb. 10, 2003); *UTAM, Inc*. at 3 (Feb. 10, 2003).

[11] *City and County of San Diego* at 12-13 (Feb. 10, 2003); *Public Safety Wireless Network* at 6 (Feb. 25, 2003).

[12] *Consensus Parties* at 6 (Dec. 24, 2002).

[13] *Public Safety Wireless Network* at 5 (Feb. 10, 2003); *NAM/MRFAC* at 5 (Feb. 10, 2003); *City of Baltimore* at 4 (Feb. 25, 2003); *Mobile Relay Associates* at 13-14 (Feb. 10, 2003); *Consolidated Edison Company* at 19 (Feb. 10, 2003); *City of New York* at 5 (Feb. 10, 2003); *Verizon Wireless* at 10 (Feb. 10, 2003).

In May 2002, Motorola estimated that 30-40 percent of public safety radios would need to be replaced, resulting in replacement costs of up to $3 billion.[14] The record on receiver replacement costs alone is enough to put in doubt the adequacy of the Plan's financing.

4. The Plan Fails to Include Funding for Other Relocation Costs. Many commenters raise concerns about other costs they expect to incur but that do not appear to have been included in the $850 million "capped" fund. The FCC must ensure that these costs can be reimbursed – and that there is sufficient money in the Plan to pay for them. Otherwise it risks disruption to the 800 MHz band and an incomplete relocation that does not solve the interference problems that the Plan purports to fix.

- Manufacturer, Software and Consulting Costs. The Plan's proposed funding may not cover manufacturers' costs to develop new firmware and software to support the relocation of NPSPAC common infrastructure (including legacy controllers that are at or near end of manufacturer production), mobiles, and portable receivers. The Consensus Parties recently clarified that their Plan is intended to include manufacturers' costs that are deemed "reasonable," though they do not provide any details. Importantly, their previous estimate does not include these expenses, and the estimate for consulting fees is "ridiculously low."[15]

- SMR system costs. The $150 million earmarked for non-public safety relocation would not be enough to cover the loss of SMR licensees' customers and the devaluation of spectrum bought at a premium from the FCC.[16]

- Border Area Costs. The Plan does not cover the unique costs of border area licensees, including the costs caused by double frequency coordination issues, renegotiation of bilateral agreements, and the costs of new equipment.[17]

- Personnel Costs. One state raises concerns about the uncovered cost to public safety agencies of diverting technical personnel from normal duties to handle relocation matters.[18]

- Necessary Additional Antenna Sites. The Plan does not contemplate costs that would be incurred by licensees that would have to add additional sites to existing systems to accommodate the plan's reduced channel spacing.[19]

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[14] *ALLTEL/Cingular/Sprint PCS/AT&T Wireless/Southern LINC/US Cellular* at 6-7 (Feb. 25, 2003) (citing *Motorola* at 25 (May 6, 2002)). The Consensus Plan's cost estimate relies on an estimate by Nextel that only one percent of public safety radios, and five percent of non-public safety radios, will need to be replaced. *Consensus Parties* at Appendix A, p. 4 (Dec. 24, 2002).

[15] *Public Safety Improvement Coalition* at 3, 4 n.6 (Feb. 10, 2003); *Motorola* at 22 (Feb. 10, 2003).

[16] *SMR of Columbia* at 2 (Feb. 25, 2003).

[17] *Border Area Coalition (Boeing/Consumers Energy/DaimlerChrysler/Pinnacle West/San Diego)* at 12-14 (Feb. 10, 2003); *Palomar Communications, Inc*. at 4 (Feb. 10, 2003). The Plan has yet to come up with a viable border area frequency allocation scheme for Tucson, Yuma, and San Diego. The proposed frequency allocations make interoperability impossible for Public Safety between border and non-border systems.

[18] *Michigan Dept. of Information Technology* at 3 (Feb. 10, 2003).

THE PLAN WOULD SUBJECT 800 MHz USERS TO SUBSTANTIAL UNCERTAINTY AND DOES NOT GUARANTEE FULL REIMBURSEMENT OF RELOCATION EXPENSES

1. The Consensus Plan Offers No Assurance to 800 MHz Users That They Will Receive Full Reimbursement of Relocation Expenses. Under the Plan, a Relocation Coordination Committee ("RCC") – not the FCC – would control critical details of the relocation process and define the terms of expense reimbursement. The RCC would be comprised of Nextel and four members designated by the Land Mobile Communications Council (two representing public safety licensees and two representing private mobile licensees). Local governments have objected to this process,[20] and their concerns are understandable.

Under the Plan, relocating incumbents would be forced into a nine-month mandatory negotiation period with Nextel. A committee empanelled by the RCC would be empowered to establish replacement channel locations and imbued with authority to ultimately determine the specific relocation costs that will be reimbursed. Importantly, the Plan would reimburse only those costs deemed "reasonable" by the RCC. There are no definitions, however, for what those costs are, let alone how a cost will be evaluated as "reasonable" or not. The decision will be left up to the RCC, with few constraints.

Relocating users that fail to successfully negotiate an agreement with Nextel must submit to binding arbitration, with no other apparent legal remedy or other recourse under the Plan. The FCC apparently would not have any enforcement power (and it could not without adopting rules, which it has not proposed). In short, incumbent licensees would be essentially dependent on the largesse of the RCC.

Importantly, the Plan offers no definite path for dispute resolution for public safety licensees that are precluded by law from participating in binding arbitration. While the Consensus Parties recognize this significant limitation of the Plan, they simply propose that parties "be directed to undertake all best efforts to reconcile any unresolved cost and/or timing issues."[21] This provision should provide little comfort to public safety licensees and their associated state and local governments.

2. The Plan May Force Public Safety to Pay for Relocation First. The Plan does <u>not</u> "front" the money to public safety (or other relocating 800 MHz users) to buy the new software, antennas, receivers and other equipment needed to operate on different spectrum. It is instead a reimbursement system that forces users to pay the costs of relocating and <u>then</u> apply for compensation. (Under the Plan, public safety licensees would be <u>required</u> to move to new spectrum.)

Particularly at a time when state and local governments are reeling from huge deficits, the FCC should not impose on them a scheme in which governments may be forced to appropriate hundreds of millions of dollars to pay for relocation even if they may later be reimbursed. Such an FCC action would be a classic "unfunded mandate" on deficit-ridden states

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[19] *Boeing* at 24 (Feb. 10, 2003).

[20] City of New York at 2, 6-7 (Feb. 10, 2003); City of Philadelphia at 6 (Feb. 10, 2003).

[21] *Consensus Parties* at footnote 36 (Dec. 24, 2002).

and localities. As one governmental entity put it, the Plan would require taxpayers "to pay for relocation up front and [they] will find out only after the funds are irrevocably committed if the optimistic funding scheme proposed in the [Consensus Plan] fails."[22]

Another problem with a reimbursement system – even if reimbursement was certain and enforceable – is that it is often difficult if not impossible for public safety agencies to obtain advance appropriations to pay for reimbursable relocation efforts. They would need to budget for these expenses and be authorized to incur them. Government entities have already raised this concern. One noted, for example, that requiring incumbent licensees to relocate to realigned channels while in the process of constructing their primary systems "may cause conflicts with legislatively mandated funding constraints."[23]

The Plan does contemplate the possibility that payments may be made directly to manufacturers, engineering firms, consultants, and others that may provide equipment and/or services to the relocating incumbent licensee.[24] However, vendors may be unwilling to provide equipment and/or services without a guarantee from the government agency that it will cover the costs or any shortfall if the vendor cannot secure full payment from the Relocation Fund.

3. The Plan Does Not Guarantee That Users Will Be Promptly Reimbursed. 800 MHz users are required to seek relocation funds through a "Fund Administrator." Tellingly, this entity or individual must be "acceptable to Nextel and subject to the reasonable consent of [other Consensus Parties] and the Private Wireless Coalition."[25] Thus the Fund Administrator would not be truly independent. The FCC would appear to have no role in this process. Neither the FCC nor any court or other entity would be able to impose any legal obligations on the Fund Administrator – nor would the Fund Administrator have any legal rights to compel payments from Nextel. To the contrary, the Fund Administrator would have every incentive to cooperate with Nextel. A relocating user that believes it did not receive full reimbursement has no legal remedy or other recourse under the Plan. 800 MHz users would be, in short, dependent on the largesse of an as yet unidentified Administrator who, in turn, would be dependent on the largesse of Nextel.

Even if the Fund Administrator agrees that the relocating entity's costs were reasonable, there is no time frame for when reimbursement requests will be approved and disbursements made. Again, there is a countervailing financial incentive against prompt payments. Nextel has an obvious financial interest in ensuring that money is not disbursed faster than its affiliate is able to generate cash or other financing to pay for relocation costs. Again, applicants have no enforceable right to receive payment by any date.

The proposal is exceedingly vague regarding the procedures that would trigger payments after Nextel's initial $25 million contribution, saying only that "Nextel . . . will continue to make periodic contributions so that the Fund Administrator has funds on deposit from which to pay

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[22] *City of Philadelphia* at 5 (Feb. 10, 2003).

[23] *State of Florida* at para. 9 (Feb. 10, 2003).

[24] *Consensus Parties* at 21 (Dec. 24, 2002).

[25] *Consensus Parties* at 7 (Dec. 24, 2002).

Plan retuning costs."[26] But it does not explain how or when the Administrator must disburse those funds – or who receives the benefit of interest earned on those funds.

This raises other obvious practical concerns the FCC must consider. What if ten entities all apply for reimbursement during the same month? Can the Fund Administrator take each in turn, and if so, who is reimbursed first? If it considers all requests together, can it award, say, ten cents on the dollar if it does not have sufficient money in the Fund at that time? If it later receives more money from Nextel, does it move on to other reimbursement requests, or does it complete payment on uncompleted ones? Competition for limited fund dollars is a recipe for problems. It would be absurd even to consider this type of funding system absent well thought out, detailed controls to ensure funding is disbursed fairly and under some enforceable regime. The Plan provides no assurance that this will happen. It would be irresponsible public policy to adopt such a skeletal plan.

THE CONSENSUS PLAN'S FUNDING SYSTEM LACKS ANY ENFORCEABLE FUNDING OBLIGATION

1. The FCC Has Proposed No Rule to Guarantee The Money Will Be There for Relocating 800 MHz Licensees. While the Plan rests entirely on Nextel's offer to fund up to $850 million, there is no apparent legal authority that makes that offer binding, undercutting any assurance that the money would in fact be made available. The FCC has no mechanism in place to enforce funding. The purported "commitment" would not arise from any provision of the Communications Act or from any FCC rule.

While it is possible that the FCC could craft a set of regulations to govern the funding of relocation, as it did for relocating microwave users from the PCS band, it has not proposed any regulation that would impose such an obligation. The Administrative Procedures Act would require that rules be proposed and adopted before Nextel or any other entity could be subjected to an enforceable funding obligation. In the absence of such rules, any funding "commitment" is illusory.

2. Reliance on Future Funding Risks Another NextWave Disaster for the FCC and No Money for Relocating 800 MHz Licensees. The Plan proposes an "installment-type mechanism" that would put the FCC in the untenable position of having ordered massive spectrum relocation based on Nextel's willingness and ability to make future contributions to the relocation fund.[27]

The FCC learned from bitter experience in the NextWave license litigation that a financing system that relies on commitments by licensees to make future payments is rife with the risk of default and failure to pay. The Supreme Court ruled that the FCC unlawfully cancelled NextWave's licenses based on NextWave's default on more than $4 billion in auction commitments that it made in return for being awarded its licenses.

[26] *Id*.

[27] *CTIA* at 10 (Feb. 25, 2003); *Small Business in Telecommunications* at 33 (Jan. 10, 2003).

The Plan presents exactly the same risk of default. It asks the FCC to accept a "promise" to pay over time, in return for granting a new Nextel affiliate 1.9 GHz spectrum licenses.[28] In fact the situation would be even more problematic for the FCC, because the Plan has no specific schedule for making specific payments. There is no timetable or schedule for measuring Nextel's performance; rather, Nextel's payments are entirely at its discretion. Thus if Nextel failed to pay, there would be no way for the FCC to determine that Nextel was in default as to any particular amount on any particular date. Indeed, it is unclear under what authority the FCC could declare Nextel in default on its promise to pay and seek to collect the payments.

Because the Plan relies almost entirely on a promise of future funding, neither the FCC nor relocating 800 MHz licensees can count on the money actually being available. This is why the FCC no longer uses installment financing in licensing but insists that new licensees pay for their spectrum "on the barrel." Here, however, the FCC is being asked to regress to the discredited disaster of installment financing – and in a situation where the viability of public safety communications systems depends in part on that financing being available when needed.

3. "Security" for the Fund Would Come from an Entity that Does Not Yet Exist. The Plan makes clear that once Nextel pays $25 million, it is not obligated to contribute any particular amount or at any specific time. Nor is Nextel offering any of its own considerable assets to secure its promise. The "security" for Nextel's funding commitment would instead come from a new Nextel affiliate, which would hold the licenses for the 1.9 GHz spectrum that will be awarded as part of the FCC's adoption of the Plan.[29] But that entity does not even exist today. Its financial qualifications cannot be assessed. The FCC would be banking on a non-existent entity to secure 97% of the $850 million.

After the initial $25 million deposit, neither Nextel nor its affiliate would be committed to pay any specific amount at any specific time. Nextel's funding concept relies on a voluntary pledge from a single entity, whose financial success is not assured. Indeed, there is nothing in the Plan that explains how this affiliate can be expected to raise sufficient funds on a timeline that could match the costs of 800 MHz relocation. Several parties have raised the concern that the lack of a guarantee of full funding from Nextel places the risks of underfunding on the public safety community because there is no assurance that the Plan can back up its "no relocation without full reimbursement" pledge.[30] The funding proposal works to shield Nextel from liability, but it would not adequately protect the Fund from a shortfall in funding.[31]

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[28] Other parties have challenged the FCC's legal authority to award spectrum to Nextel without complying with the competitive bidding requirements of Section 309(j) of the Communications Act. While those issues are separate from the funding problems discussed here, clearly these and other challenges to the legality of the Plan counsel against its adoption. Would, for example, the FCC expect Nextel to finance relocation while the Commission's grant to it of 1.9 GHz licenses is on appeal?

[29] *Consensus Parties* at 7-8 (Dec. 24, 2002). Significantly, the Consensus Plan's current funding mechanism of "periodic contributions" from Nextel is a change from its original approach, wherein to satisfy its original $500 million commitment, Nextel offered to make an initial $50 million contribution and establish an escrow account of $450 million on which the Fund could draw upon satisfaction of certain conditions. *Nextel* at 31-32 (Aug. 7, 2002). The "additional security" offered in Nextel's revised funding commitment is actually far less secure than an escrow arrangement, where an amount of money is certain to be available on which to draw.

[30] *City of Philadelphia* at 4 (Feb. 10, 2003). *Verizon Wireless* at 11 (Feb. 10, 2003); *City of Baltimore* at 3 (Feb. 10, 2003). *Public Safety Wireless Network* at 6, 8 (Feb. 25, 2003).

[31] *ALLTEL/Cingular/Sprint PCS/AT&T Wireless/Southern LINC/US Cellular* at 13 (Feb. 10, 2003).

4. The "Backup" Spectrum Pledge Would Not Assure Funding. The Plan proposes that Nextel would "secure its ability to fund the Plan retuning costs by setting up a separate corporate entity(ies), the purpose of which is to hold assets to secure the Nextel funding obligation." Nextel's stock in the entity(ies) would be pledged to an escrow agent or trustee, who could sell assets and hold the proceeds for the benefit of the Fund. The "assets" to be placed in the "separate entity(ies) would be "the 10 MHz of replacement spectrum in the 1.9 GHz band for which Nextel will be granted licenses."

The "security" being offered is uncertain and inadequate.

- Who is the escrow agent or trustee? What would be the agreement under which the trustee would hold the stock? How would the FCC ensure that any agreement protects its own interests as well as relocating licensees? What discretion would the trustee have? Under what circumstances would "default" be declared? Would the affiliate have a right to cure? For how long? What if it appealed?

- If only the stock is pledged, only the stock could be sold on foreclosure. The trustee would have no apparent ability to force a sale of the company's licenses unless it first obtains FCC approval of a transfer of control of the company. Nextel may contest action by the trustee, but even if it does not, either approach could take years before proceeds could be deposited in the fund.

- Even if the trustee can be forced to sell the spectrum to raise relocation money, who would decide how much spectrum needed to be sold, since there would be no certain way to value the spectrum absent an auction?

- How would any sale occur? Since the spectrum would originally have been granted to the Nextel affiliate, the FCC would have no rules in place for auctioning the 1.9 GHz spectrum, yet it would certainly want to use competitive bidding to maximize the spectrum's value and pay for 800 MHz relocation. It would thus have to conduct a rulemaking to adopt rules to govern the auction, then conduct the auction and collect payments from high bidders. Moreover, legislation would be required to give the Commission the requisite authority to use the proceeds of the auction to pay for relocation. Without such authority, the proceeds from the auction must be deposited in the U.S. Treasury.

- Under the funding plan, Nextel apparently would retain control over the 1.9 GHz spectrum. The Plan does not provide any specifics as to the circumstances that would trigger the trustee's right to sell assets, nor does it specify termination or reclamation rights held by the trustee. Presumably, if Nextel stopped paying into the fund, the escrow agent/trustee could foreclose on the stock of the separate entity and then sell the assets. Nextel could contest this process, but even if it does not, the process could possibly take years. Meanwhile the fund will have been depleted, 800 MHz users who have already relocated will be left empty-handed, and the rebanding process will be stopped in its tracks.

- It is crucial that the sole purpose of the separate affiliate is to hold the spectrum assets. If it has any operational authority, it might incur debts and would therefore not be "bankruptcy-proof" itself. The proposal offers no details on this, so there can be no comfort that the assets held by the separate affiliate could not become encumbered.

These are not academic questions. In the NextWave proceeding, the FCC reauctioned cancelled spectrum licenses before it had secured its right to cancel the licenses in the first place – despite having written explicit default and cancellation remedies on the face of every license. It would be ill advised for the FCC to follow that course again, guaranteeing years of litigation before it can reclaim the 1.9 GHz spectrum – and leaving 800 MHz licensees who have already relocated to pay their own expenses.

These flaws in the funding mechanism led numerous parties to challenge the wisdom of ordering relocation that depends for its financing on a future promise that is secured by bare spectrum. They have noted that a pledge of the stock of the Nextel entity holding the 1.9 GHz spectrum could become worthless if Nextel is ultimately forced to file for bankruptcy, and that Nextel's retention of the right to substitute other assets or securities for the pledged spectrum places into question the security of Nextel's obligation, especially if Nextel defaults and/or is forced into bankruptcy.[32] They have also warned that relying for security on the sale of 1.9 GHz spectrum is risky and unwise, given the volatility in spectrum valuations.[33]

Another party points out an additional flaw: The Plan actually proposes two funds, $150 million for non-public safety users and $700 million for public safety. The plan does not address what would happen if the $150 million fund for reimbursement of B/ILT licensees is exhausted and there is money left in the $700 million public safety relocation fund – or the public safety fund runs out first.[34] Given that Nextel has estimated the cost of public safety relocation to be $698 million – providing a cushion of only 0.2 % for any unanticipated public safety expenses – it is almost assured that the funds will run out before rebanding is completed.

In short, so few specifics have been provided by the Consensus Parties as to the mechanics of Nextel's funding commitment that the Commission can only guess as to what is really intended. That is, of course, not a sound or legally valid way to force hundreds of licensees to embark on an irreversible, hugely expensive relocation.

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[32] *Boeing* at 25 (Feb. 10, 2003); *CTIA* at 11 (Feb. 25, 2003); *Blooston Mordkofsky* at 3, note 1 (Feb. 10, 2003) and at 15-16 (Feb. 25, 2003); *Southern LINC* at 9-10 (Feb. 10, 2003).

[33] *Consumers Energy* at 22 (Feb. 10, 2003); *City of Philadelphia* at 4 (Feb. 10, 2003); *Harbor Wireless* at 9 (Feb. 10, 2003).

[34] *Ameren Corporation* at 6 (Feb. 10, 2003).